

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1003

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARGARET CHRISTENSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
JOSEPH E. WIMMER, Judge. *Affirmed.*

BROWN, P.J. Margaret Christensen appeals from an order revoking her driving privileges for one year for refusing to submit to a test for intoxication after being arrested for operating a motor vehicle while intoxicated. First, she claims that police did not have probable cause to stop and arrest her. Second, she claims that she was physically unable to perform the breath test due to her fear of being raped by the police. We reject her arguments and affirm.

Christensen was arrested for drunk driving on February 15, 1998. A police officer noticed that she was driving erratically, weaving about in her lane and touching both the center and shoulder lines. Christensen did not stop her vehicle when the officer turned on his flashing lights, but proceeded to her driveway where she stopped and the officer approached her vehicle. The officer noticed Christensen's speech was slurred and she smelled strongly of intoxicants. She had trouble removing her license from her wallet. When the officer asked her to perform field sobriety tests, she refused. In response to the officer's admonition that she would be arrested if she did not attempt the tests she replied, "You can't arrest me on my property." The officer had to physically subdue Christensen to get her in the squad car, and then she defecated in her pants on the way to the police station. At the station, Christensen did not give an adequate breath test and refused a blood test. She later requested a refusal hearing, at which the trial court found her refusal unreasonable and ordered her driving privileges revoked. It is from this order that Christensen appeals.

Christensen attacks her stop and arrest on the grounds that the police officer did not have reasonable suspicion that she was committing a crime and thus did not have probable cause to stop and arrest her. She also claims that she was afraid that the officer was going to rape her, and the paralysis brought on by this fear rendered her unable to perform the breath test.

Our review of whether a police officer had probable cause to arrest a suspect is de novo. See *State v. Morgan*, 197 Wis.2d 200, 208, 539 N.W.2d 887, 891 (1995). For a stop to be permissible, the police officer must be aware of "specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." *State v. Waldner*, 206 Wis.2d 51, 55, 556 N.W.2d 681, 684 (1996). We look to the totality of the circumstances to determine

whether the “arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986).

We have no trouble validating the stop and subsequent arrest in this case. As noted above, Christensen was driving erratically and failed to heed the officer’s flashing lights. She smelled of intoxicants. She had slurred speech. She refused to take the field sobriety tests. These articulable facts are more than sufficient to lead a reasonable police officer to believe that Christensen had been operating her motor vehicle while intoxicated.

We now turn to Christensen’s second argument: she claims the trial court erred in finding that her fear of being raped was not a proper reason to refuse to submit to a breath or blood sample. According to Christensen, her fear of being raped at the police station rendered her “physically unable to submit to the breath test.” Christensen’s theory is that this fear counts as a physical disability or disease that excuses her refusal to perform the test. *See* § 343.305(9)(a)5.c, STATS.¹

Whether fear qualifies as a physical disability under § 343.305(9)(a)5.c, STATS., is a matter of statutory interpretation; this presents a question of law we review de novo. *See State v. Vincent*, 171 Wis.2d 124, 127, 490 N.W.2d 761, 763 (Ct. App. 1992). However, the trial court’s findings

¹ Section 343.305(9)(a)5.c, STATS., reads in part:

The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

regarding Christensen's credibility will not be overturned unless clearly erroneous. *See State v. Wilson*, 179 Wis.2d 660, 682-83, 508 N.W.2d 44, 53 (Ct. App. 1993).

Christensen's argument is disingenuous and we reject it. She claims she thought the officers were actually rapists impersonating officers. She says her defecation in the squad car was a defense mechanism to deter the rape. While the trial court did not comment on Christensen's credibility, it did note that "it's quite unreasonable for a person to believe when two squad cars pull into a driveway that it would be ... two people impersonating police officers in two make-believe squads that would be out to get her and to rape her." Discussing Christensen's explanation that her refusal to submit to a blood test was also out of fear, the trial court said, "I don't know that any reasonable person would think that a person that was out to rape her would, first of all, take her to a building [a police station] and offer her an intoxilyzer test." Furthermore, Christensen's fear paralysis theory is belied by the officer's testimony about the arrest. Christensen got out of her vehicle while the officer was checking her license, and when he told her to get back in the car she "stated in an angry tone that it was her residence and she would do what she wants." When the officer asked her to perform the field sobriety tests, she said, "I'm not going to do any of your tests." When the officer asked her if she had any physical disabilities she replied, "No, do you?!" Her belligerent comments and persistent struggling do not jibe with the picture she paints of herself at the police station—so terrified that she was physically unable to blow into the intoxilyzer. We have no trouble upholding the trial court's finding that the refusal was unreasonable and that Christensen "did not have a physical disability or disease ... which would be the basis for the refusal."

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

